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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

IN RE VERIFONE HOLDINGS, INC. ) No. C 07-06140 MHP  
SECURITIES LITIGATION, ) Honorable Marilyn Hall Patel  
 ) Courtroom 15  
 )  
 ) Hearing: March 17, 2008  
 ) 2:00 p.m.

**MEMORANDUM OF POINTS AND AUTHORITIES IN FURTHER  
SUPPORT OF CLAL FINANCE BATUCHA INVESTMENT MANAGEMENT,  
LTD.'S AND DIRECT INVESTMENT HOUSE (PROVIDENCE FUNDS) LTD.'S  
MOTION TO APPOINT LEAD PLAINTIFF AND APPROVE LEAD COUNSEL**

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CLAL FINANCE BATUCHA INVESTMENT MANAGEMENT, LTD.'S AND DIRECT INVESTMENT HOUSE'S MOTION FOR APPOINTMENT AS LEAD PLAINTIFF AND FOR APPROVAL OF LEAD COUNSEL

## TABLE OF CONTENTS

|    |  |    |
|----|--|----|
| 3  | PRELIMINARY STATEMENT .....  | 1  |
| 4  | ARGUMENT .....   | 6  |
| 5  | A. CLAL AND DIRECT SHOULD BE APPOINTED                                       |    |
| 6  | LEAD PLAINTIFFS FOR THE CLASS .....  | 6  |
| 7  | 1. <i>Cavanaugh's</i> Three-Step Process For Appointing Lead Plaintiff ..... | 6  |
| 8  | a. Notice of Pendency .....  | 6  |
| 9  | b. Losses Suffered by the Plaintiffs .....                                   | 7  |
| 10 | c. Typicality and Adequacy .....   | 10 |
| 11 | d. Rebutting the Presumption .....   | 12 |
| 12 | B. CLAL'S AND DIRECT'S SELECTION OF COUNSEL SHOULD BE                        |    |
| 13 | APPROVED AS LEAD AND LIAISON COUNSEL FOR THE CLASS .....                     | 14 |
| 14 | CONCLUSION .....   | 15 |

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CLAL FINANCE BATUCHA INVESTMENT MANAGEMENT, LTD.'S AND DIRECT INVESTMENT HOUSE'S MOTION FOR APPOINTMENT AS LEAD PLAINTIFF AND FOR APPROVAL OF LEAD COUNSEL

**TABLE OF AUTHORITIES**

**Cases**

|    |  |                  |
|----|--|------------------|
| 4  | <i>Alfadda v. Fenn,</i><br>935 F.2d 475 (2d Cir. 1991) .....   | 14               |
| 6  | <i>Aronson v. McKesson HBOC, Inc.,</i><br>79 F. Supp. 2d 1146, 1153 (N.D. Cal. 1999) .....                             | 10, 12           |
| 7  | <i>In re Baan Co., Sec. Litig.,</i><br>186 F.R.D. 214 (D.D.C. 1999) .....  | 12               |
| 9  | <i>In re Cable &amp; Wireless, PLC, Secs. Litig.,</i><br>217 F.R.D. 372 (E.D. Va. 2003) .....                          | 14               |
| 10 | <i>In re Cavanaugh,</i><br>306 F.3d 726 (9th Cir. 2002) .....  | 6, 7, 10, 13, 15 |
| 12 | <i>In re Comverse Technology, Inc., Sec. Litig.,</i><br>2007 U.S. Dist. LEXIS 14878 (E.D.N.Y. Mar. 2, 2007) .....      | 8, 9             |
| 14 | <i>In re Cornerstone Propane Partners LP Sec. Litig.,</i><br>2006 U.S. Dist. LEXIS 25819 (N.D. Cal. May 3, 2006) ..... | 3                |
| 15 | <i>Corwin v. Seizinger,</i><br>2008 U.S. Dist. LEXIS 3045 (S.D.N.Y. Jan. 8, 2008) .....                                | 14               |
| 17 | <i>Cromer Fin. Ltd. v. Berger,</i><br>137 F. Supp. 2d 452 (S.D.N.Y. 2001) .....  | 14               |
| 19 | <i>Danis v. USN Communs., Inc.,</i><br>189 F.R.D. 391 (N.D. Ill. 1999) .....   | 11               |
| 20 | <i>Dura Pharmaceuticals, Inc. v. Broudo,</i><br>544 U.S. 336 (2005) .....  | 9, 10            |
| 22 | <i>Erikson v. Cornerstone Propane Partners LP,</i><br>2003 U.S. Dist. LEXIS 18009 (N.D. Cal. Sept. 9, 2003) .....      | 6, 15            |
| 23 | <i>In re eSpeed, Inc. Sec. Litig.,</i><br>232 F.R.D. 95 (S.D.N.Y. 2005) .....  | 8                |
| 25 | <i>Hanon v. Dataproducts Corp.,</i><br>976 F.2d 497 (9th Cir. 1992) .....  | 11               |
| 27 | <i>Hill v. The Tribune Company,</i><br>2005 U.S. Dist. LEXIS 2391 (N.D. Ill. Oct. 13, 2005) .....                      | 8                |

|    |   |        |
|----|---|--------|
| 1  | <i>Hunt v. Enzo Biochem, Inc.</i> ,<br>2008 U.S. Dist. LEXIS 1472 (Jan. 8, 2008) .....                                    | 8      |
| 2  | <i>Itoba, Ltd. v. Lep Group PLC</i> ,<br>54 F.3d 118 (2d Cir. 1995) .....   | 14     |
| 4  | <i>Lax v. First Merchants Acceptance Corp.</i> ,<br>1997 U.S. Dist. LEXIS 11866 (N.D. Ill. Aug. 11, 1997) .....           | 9      |
| 5  | <i>Lerwill v. Inflight Motion Pictures, Inc.</i> ,<br>582 F.2d 507 (9th Cir. 1978) .....                                  | 11     |
| 7  | <i>In re Nortel Networks Corp. Sec. Litig.</i> ,<br>2003 U.S. Dist. LEXIS 15702 (S.D.N.Y. Sept. 8, 2003) .....            | 14     |
| 9  | <i>In re Northern Dist. Of Cal., Dalkon Shield IUD Prod. Liab. Litig.</i> ,<br>693 F.2d 847 (9th Cir. 1982) .....         | 11     |
| 10 | <i>In re Olsten Corp. Sec. Litig.</i> ,\<br>3 F. Supp. 2d 286, 296 (E.D.N.Y. 1998) .....                                  | 9      |
| 12 | <i>Osher v. Guess?, Inc.</i> ,<br>2001 U.S. Dist. LEXIS 6057 (C.D. Cal. Apr. 26, 2001) .....                              | 6, 15  |
| 14 | <i>In re Pacific Gateway Exchange, Inc. Secs. Litig.</i> ,<br>No. C 00-1211 PJH, slip op. (N.D. Cal. Nov. 17, 2000) ..... | 3, 7   |
| 15 | <i>In re Razorfish, Inc. Sec. Litig.</i> ,<br>143 F. Supp. 2d 304 (S.D.N.Y. 2001) .....                                   | 12     |
| 17 | <i>Riordan v. Smith Barney</i> ,<br>113 F.R.D. 60 (N.D. Ill. 1986) .....  | 12     |
| 18 | <i>In re Royal Ahold N.V. Secs. &amp; ERISA Litig.</i> ,<br>351 F. Supp.334(D. Md. 2004) .....                            | 14     |
| 20 | <i>In re Silicon Graphics, Inc. Secs. Litig.</i> ,<br>183 F.3d 970 (9th Cir. 1999) .....                                  | 3      |
| 22 | <i>Squyres v. Union Texas Petroleum Holdings, Inc.</i> ,<br>1998 U.S. Dist. LEXIS 22945 (C.D. Cal. Nov. 2, 1998) .....    | 6      |
| 23 | <i>Takeda v. Turbodyne Techs., Inc.</i> ,<br>67 F. Supp. 2d 1129 (C.D. Cal. 1999) .....                                   | 11, 12 |
| 25 | <i>Tanne v. Autobytel, Inc.</i> ,<br>226 F.R.D. 659 (C.D. Cal. 2005) .....  | 10     |
| 26 | <i>In re Vivendi Universal, S.A. Secs. Litig.</i> ,<br>242 F.R.D. 76 (S.D.N.Y. 2007) .....                                | 14     |

|    |  |               |
|----|--|---------------|
| 1  | <i>In re Watchguard Sec. Litig.</i> ,<br>2005 U.S. Dist. LEXIS 40923 (D. Wash. July 13, 2005) .....            | 1             |
| 2  |  |               |
| 3  | <i>Weltz v. Lee</i> ,<br>1999 F.R.D. 129 (S.D.N.Y. 2001) .....   | 12            |
| 4  |  |               |
| 5  | <i>Wenderhold v. Cylink Corp.</i> ,<br>188 F.R.D.577 (N.D. Cal. 1999) .....                                    | 10            |
| 6  |  |               |
| 7  | <b><u>Docketed Cases</u></b>   |               |
| 8  |  |               |
| 9  | <i>Cerini v. Verifone Holdings, Inc.</i> ,<br>No. C 07-06228 MHP (N.D. Cal. Dec. 10, 2007) .....               | <i>passim</i> |
| 10 |  |               |
| 11 | <i>Eichenholtz v. Verifone Holdings, Inc.</i> ,<br>No. C 07-06140 MHP (N.D. Cal. Dec. 4, 2007) .....           | <i>passim</i> |
| 12 |  |               |
| 13 | <i>Feitel v. Verifone Holdings, Inc.</i> ,<br>No. C 08-00118 MHP (Jan. 7, 2008) .....                          | <i>passim</i> |
| 14 |  |               |
| 15 | <i>Feldman v. Verifone Holdings, Inc.</i> ,<br>No. C 07-06218 MHP (Dec. 7, 2007) .....                         | <i>passim</i> |
| 16 |  |               |
| 17 | <i>Lien v. Verifone Holdings, Inc.</i> ,<br>No. C 07-06195 JSW (N.D. Cal. Dec. 6, 2007) .....                  | <i>passim</i> |
| 18 |  |               |
| 19 | <i>Hill v. Verifone Holdings, Inc.</i> ,<br>No. C 07-06238 MHP (Dec. 10, 2007) .....                           | <i>passim</i> |
| 20 |  |               |
| 21 | <i>Offut v. Verifone Holdings, Inc.</i> ,<br>No. C 07-06241 MHP (Dec. 11, 2007) .....                          | <i>passim</i> |
| 22 |  |               |
| 23 | <i>Vaughn v. Verifone Holdings, Inc.</i> ,<br>No. C 07-06197 VRW (Dec. 6, 2007) .....                          | <i>passim</i> |
| 24 |  |               |
| 25 | <i>Westend Capital Management LLC v. Verifone Holdings, Inc.</i> ,<br>No. C 07-06327 MMC (Dec. 10, 2007) ..... | <i>passim</i> |
| 26 |  |               |
| 27 | <b><u>Congressional Materials</u></b>  |               |
| 28 |  |               |
| 29 | <i>H.R. Conf. Rpt. No. 104-369, 104th Cong. 1st Sess (Nov. 28, 1995)</i> .....                                 | 12, 15        |
| 30 |  |               |

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CLAL FINANCE BATUCHA INVESTMENT MANAGEMENT, LTD.'S AND DIRECT INVESTMENT HOUSE'S MOTION FOR APPOINTMENT AS LEAD PLAINTIFF AND FOR APPROVAL OF LEAD COUNSEL

1 CLAL Finance Batucha Investment Management, Ltd. (“CLAL”) and Direct Investment  
 2 House, (Providence Funds) Ltd. (“Direct”) respectfully submit this Memorandum of Points and  
 3 Authorities in Further Support of their Motion for Appointment as Lead Plaintiff and for  
 4 Approval of Lead Counsel, and in opposition to the opposing motions for lead plaintiff.

5 **PRELIMINARY STATEMENT**

6 CLAL and Direct have the largest financial interest of any movant seeking to represent  
 7 the Class defined as purchasers of Verifone Holdings, Inc. (“Verifone” or the “Company”)  
 8 common stock during the Class Period of March 1, 2007 through December 3, 2007.<sup>1</sup> The first  
 9 Notice of Pendency filed in this action stated a class period of March 1, 2007 through November  
 10 30, 2007.<sup>2</sup> The end date of November 30, 2007 does not reflect that fact that shares of Verifone  
 11 common stock were traded until the disclosure on December 3, 2007. Accordingly, shares  
 12 purchased between November 30, 2007 and December 3, 2007 were artificially inflated and  
 13 should be included in the Class.

14 There is no basis, however, to extend the class period earlier to August 31, 2006 or  
 15 September 1, 2006, and nothing in the complaints citing an earlier commencement date allege  
 16 anything that would support such an extension.<sup>3</sup> In deciding the motions for appointment of lead  
 17 plaintiff, the Court “must rely solely on the pleadings and declarations that each contestant  
 18 provides.” *In re Watchguard Sec. Litig.*, 2005 U.S. Dist. LEXIS 40923, at \*8 (D. Wash. July 13,  
 19

20

21 <sup>1</sup> See Declaration of Jane Nettesheim (“Nettesheim Dec .”) at Exhibit 3A, filed herewith.

22 <sup>2</sup> See Declaration of Patrick V. Dahlstrom In Support Of The Memorandum of Points and  
 23 Authorities In Support Of CLAL Finance Batucha Investment Management, Ltd.’s and Direct  
 24 Investment House (Providence Funds), Ltd.’s Motion To Appoint Lead Plaintiff And Lead Counsel  
 (“Dahlstrom Dec.”), at Exhibit A.

25 <sup>3</sup> See *Lien v. Verifone Holdings, Inc.*, No. C 07-06195 JSW, Complaint (Dec. 6, 2007)  
 26 (Docket Entry #1); *Vaughn v. Verifone Holdings, Inc.*, No. C 07-06197 VRW, Complaint (Dec. 6,  
 27 2007) (Docket Entry #1); *Cerini v. Verifone Holdings, Inc.*, No. 07-06228 SC, Complaint (Dec. 10,  
 28 2007) (Docket Entry #1); *Westend Capital Management LLC v. Verifone Holdings, Inc.*, No. C 07-  
 06327 MMC, Complaint (Dec. 10, 2007) (Docket Entry #1).

1 2005), *citing Cavanaugh*, 206 F.3d at 730. Here, the only documents that have been filed in  
 2 support a longer class period are the filed complaints. Thus, unless the complaints citing the  
 3 longer class period allege facts that adequately plead a basis for the longer period, there should be  
 4 no deviation from the class period in the Notice of Pendency published pursuant to the first filed  
 5 case.

6       The statement upon which all of the complaints rely in disclosing the truth is a December  
 7 3, 2007 Verifone press release which explicitly states that Verifone would “need to restate results  
 8 from the first three quarters of fiscal 2007.” *Compare Eichenholtz v. Verifone Holdings, Inc.*, No.  
 9 C 07-06140 MHP, Complaint ¶31 (N.D. Cal. Dec. 4, 2007) (Docket Entry #1), *with Lien v.*  
 10 *Verifone Holdings, Inc.*, No. C 07-06195 JSW, Complaint ¶32 (N.D. Cal. Dec. 6, 2007) (Docket  
 11 Entry #1), *and Cerini v. Verifone Holdings, Inc.*, No. C 07-06228 MHP, Complaint ¶¶32, 34  
 12 (N.D. Cal. Dec. 10, 2007) (Docket Entry #1). The *Cerini* Complaint also cited to an *Associated*  
 13 *Press* report that tied the restatement directly to the integration of the Lipman Electronics  
 14 acquisition, which was not completed until “November 2006,” *see Cerini* Complaint ¶34, and  
 15 thus did not appear on Verifone’s financials until March 1, 2007. Accordingly, the *Associated*  
 16 *Press* reiterated that Verifone “will restate results from the first none months of the [fiscal] year.”  
 17 *Id.*

18       There is absolutely no new information in the *Lien*, *Vaughn*, or *Westend* complaints that  
 19 supports extending the class period to August 31, 2006, or in the *Cerini* complaint to extend the  
 20 class period to September 1, 2006. The only new factual information annexed to the complaints  
 21 are the named plaintiffs’ purchases of Verifone common stock prior to March 1, 2007. Donald  
 22 Cerini, in fact, purchased a grand total of 125 shares on January 29, 2007 and sold all of them on  
 23 February 27, 2007, one day before the true Class Period begins, which means that he can not  
 24 establish loss causation for any of his claimed loss of \$248.75. *See Cerini v. Verifone Holdings,*  
 25 *Inc.*, No. C 07-06228 MHP, Certification (N.D. Cal. Dec. 10, 2007) (Docket Entry #1). *See also*  
 26 *In re Cornerstone Propane Partners LP Sec. Litig.*, 2006 U.S. Dist. LEXIS 25819, at \*24-\*28  
 27

1 (N.D. Cal. May 3, 2006); *In re Pacific Gateway Exchange, Inc. Secs. Litig.*, No. C 00-1211 PJH,  
 2 slip op., at 3-4 (N.D. Cal. Nov. 17, 2000). Ron Dockswell, one of the plaintiffs signing a  
 3 Certification in the *Vaughn* action purchased a total of 50 shares on January 25, 2007; Miriam  
 4 Logan purchased a total of 3 shares on January 9, 2007. See *Vaughn v. Verifone Holdings, Inc.*,  
 5 No. C 07-06197 VRW, Certification (Dec. 6, 2007) (Docket Entry #1).

6 Such gamesmanship is precisely the type of attorney-driven abuse that the Private  
 7 Securities Litigation Reform Act of 1995 (the “PSLRA”) was intended to eradicate from  
 8 securities class action litigation:

9 Congress enacted the PSLRA to deter opportunistic private  
 10 plaintiffs from filing abusive securities fraud claims . . . .

11 . . . .

12 The managers observed that plaintiffs routinely were filing lawsuits  
 13 “against issuers of securities and others whenever there [was] a  
 14 significant change in an issuer’s stock price, **without regard to any**  
**underlying culpability to the issuer**, and with only faint hope that  
 15 the discovery process might lead eventually to some plausible cause  
 of action.”

16 *In re Silicon Graphics, Inc. Secs. Litig.*, 183 F.3d 970, 973, 977-78 (9th Cir. 1999) (citing H.R.  
 17 Rep. Conf. No. 104-369, at 32-41 (1995) (emphasis added).

18 The *Lien*, *Vaughn*, and *Westend* complaints citing a class period that begins on August 31,  
 19 2006, and the *Cerini* complaint citing September 1, 2007, allege that statements made from  
 20 August 31, 2006 through February 28, 2007 were false for the same reasons that statements  
 21 between March 1, 2007 through December 3, 2007 were false. Yet, the only statements relied  
 22 upon in the complaints to ground the allegations of false statements from August 31, 2006  
 23 through February 28, 2007 are the December 3, 2007 press release and *Associated Press* report.  
 24 Even a cursory review of the December 3, 2007 press release and *Associated Press* report,  
 25 however, reveals that they do not offer any basis to allege that the statements from August 31,  
 26 2006 through February 28, 2007 were false, material, or artificially inflated the price of Verifone  
 27

1 common stock.

2 Furthermore, there is nothing in the *Lien* Complaint or the other three complaints alleging  
 3 an earlier starting date for the class period that even begins to satisfy the heightened pleading  
 4 standard under the PSLRA for alleging fraud under Section 10(b) of the Securities Exchange Act  
 5 of 1934 from August 31, 2006 through February 28, 2007.

6 The *Lien*, *Vaughn*, *Westend*, and *Cerini* complaints are nothing more than opportunistic  
 7 attempts to extend the class period in order to file actions on behalf of clients who purchased  
 8 Verifone common stock prior to the class period alleged the Notice of Pendency. Without a shred  
 9 of support, these four complaints were filed with the hope that by the time an amended complaint  
 10 was filed some plausible cause of action would be cobbled together. And, in so doing, the most  
 11 adequate plaintiff with the largest financial interests in the recovery sought by the class that  
 12 purchased in the correct class period may be brushed aside. Such gaming of the process under the  
 13 PSLRA should not be countenanced.  
 14

15 As the majority of complaints allege, this is a securities class action on behalf of public  
 16 investors who purchased the securities of Verifone during the period from March 1, 2007 through  
 17 December 3, 2007.<sup>4</sup> On December 3, 2007, the Company surprised investors when it announced  
 18 that its financial statements for the three months ended January 31, 2007, the three and six months  
 19 ended April 30, 2007 and the three and nine months ended July 31, 2007 should no longer be  
 20 relied upon. The Company stated that the problem with the financial statements was due to errors  
 21 in accounting related to the valuation of in-transit inventory and allocation of manufacturing and  
 22 distribution overhead to inventory. Each of these accounting errors affected VeriFone's reported  
 23 costs of net revenues. Further, the Company disclosed that its restated financial statements would

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24  
 25 <sup>4</sup> See *Eichenholtz v. Verifone Holdings, Inc.*, No. C 07-06149 MHP, Complaint ¶1 (Dec. 4,  
 26 2007) (Docket Entry #1); *Feldman v. Verifone Holdings, Inc.*, No. C 07-06218 MHP, Complaint ¶1  
 27 (Dec. 7, 2007)(Docket Entry #1); *Hill v. Verifone Holdings, Inc.*, No. C 07-06238 MHP, Complaint  
 28 ¶1 (Dec. 10, 2007)(Docket Entry #1); *Offut v. Verifone Holdings, Inc.*, No. C 07-05241 MHP,  
 Complaint ¶1 (Docket Entry #1); *Feitel v. Verifone Holdings, Inc.*, No. C 08-00118 MHP,  
 Complaint ¶1 (Jan. 7, 2008)(Docket Entry #1).

1 correct errors that overstated previously reported inventories by "material amounts," and  
 2 understated the Company's cost of net revenues by "material amounts." A preliminary review  
 3 revealed that these restatements would result in reductions to the Company's previously reported  
 4 inventory levels of approximately \$7.7 million, \$16.5 million and \$30.2 million as of January 31,  
 5 2007, April 30, 2007 and July 31, 2007, respectively. Additionally, the Company would realize  
 6 reductions to its previously reported pre tax income of approximately \$8.9 million, \$7.0 million  
 7 and \$13.8 million for the three month periods ended January 31, 2007, April 30, 2007 and July  
 8 31, 2007, respectively.

9       Also on December 3, 2007, the *Associated Press* detailed how the Company had  
 10 "overstated its profit before taxes by almost \$30 million, or 80 percent, in the first three quarters  
  11 of the fiscal year." One analyst detailed how the restatement "calls into question VeriFone's gross  
  12 margins, which up until now have been positive fuel for the stock." Other analysts stated that the  
  13 necessary inventory adjustments were likely related to VeriFone's acquisition of Lipman  
  14 Electronic Engineering, which the Company completed in November 2006.  
 15

16       On this news of the restatement of Verifone's financials going back to March 1, 2007, the  
 17 Company's shares fell \$22.00 per share, or over 45.8 percent, to close on December 3, 2007 at  
 18 \$26.03 per share, on unusually heavy trading volume. All of the elements of the claims under  
 19 Section 10(b) of the Exchange Act are alleged only for the Class Period of March 1, 2007 through  
 20 December 3, 2007. Accordingly, that is the Class Period that the Court should use to determine  
 21 the movants' financial interest in the relief sought by the Class.

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## **ARGUMENT**

**A. CLAL AND DIRECT SHOULD BE APPOINTED LEAD PLAINTIFFS FOR THE CLASS**

### **1. *Cavanaugh's Three-Step Process For Appointing Lead Plaintiff***

**a. Notice of Pendency**

The Ninth Circuit has held that the PSLRA “provides a simple three-step process for identifying the lead plaintiff.” *In re Cavanaugh*, 305 F.3d 726, 729 (9th Cir. 2002). “The first step consists of publicizing the pendency of the action, the claims made and **the purported class period.**” *Id.* (Emphasis added.) The Class Period announced in the Notice of Pendency for first filed action was March 1, 2007 through November 30, 2007. *See Dahlstrom Dec.*, at Exhibit A; *Eichenholtz v. Verifone Holdings, Inc.*, No. 07-06140 MHP, Complaint ¶ 1 (Docket Entry #1).. The *Eichenholtz* Complaint alleges that the first misstatement which artificially inflated the price of Verifone stock occurred on March 1, 2007. *See Eichenholtz* Complaint ¶23.

Under 15 U.S.C. §78u-4(a)(3)(B)(iii)(I), the Court is directed to consider all motions by plaintiffs or purported class members seeking to be appointed as lead plaintiffs filed in response to the Notice of Pendency, and "shall" appoint "the presumptively most adequate plaintiff" to serve as lead plaintiff. Further, the Court shall presume that plaintiff is "the person, or group of persons," that:

- (aa) has either filed the complaint or made a motion in response to a notice . . . ;
  - (bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and
  - (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

*See Erikson v. Cornerstone Propane Partners LP*, 2003 U.S. Dist. LEXIS 18009, at \*8-\*9 (N.D. Cal. Sept. 9, 2003); *Squyres v. Union Texas Petroleum Holdings, Inc.*, No. CV 98-6085 LGB (A.Hx), 1998 U.S. Dist. LEXIS 22945, at \*5 (C.D. Cal. Nov. 2, 1998); *Osher v. Guess? Inc.*, No.

1 CV 01-00871 LGB (RNBx), 2001 U.S. Dist. LEXIS 6057, at \*11 (C.D. Cal. Apr. 26, 2001).

2 Westend Capital Management, LLC is the only movant that filed a complaint alleging a  
 3 class period different from the class period cited in the Notice of Pendency upon which the  
 4 current motions have been filed. *See Westend Capital Management, LLC v. Verifone Holdings,*  
 5 *Inc.*, No. 07-06237 MMC, Complaint ¶1 (Dec. 10, 2007) (Docket Entry #1). The *Westend*  
 6 Complaint, however, is virtually identical to the *Lien* Complaint, which like the *Westend*  
 7 Complaint, does not state any reason for extending the Class Period to a date earlier than March  
 8 1, 2007. A review of Westend's purchases of Verifone common stock demonstrates why it  
 9 extended the class period: Westend purchased only 15,200 shares between March 1, 2007 and  
 10 December 3, 2007. It purchased 80,450 prior to March 1, 2007, with 72,900 purchased on one  
 11 day alone, October 17, 2006.

12 Westend's purchases, as well as all of the other movants' purchases prior to March 1,  
 13 2007, were made prior to the first alleged misstatement in the first filed complaint, the  
 14 *Eichenholtz* Complaint. Accordingly, any alleged loss from those purchases should not be  
 15 included in the loss calculation for lead plaintiff purposes because "it has not [been] shown that if  
 16 purchased the stock following the issuance of these allegedly false and misleading statements."  
 17 *See In re Pacific Gateway Exchange, Inc. Secs. Litig.*, No. C 00-1211 PJH, slip op., at 3-4 (N.D.  
 18 Cal. Nov. 17, 2000).

20 The Notice of Pendency for the first filed action has properly been published pursuant to  
 21 the PSLRA, and satisfies the first step under *Cavanaugh* for the Class Period of March 1, 2007  
 22 through November 30, 2007.

23       **b. Losses Suffered by the Plaintiffs**

24 Under *Cavanaugh*, "[i]n step two, . . . the district court must compare the financial stakes  
 25 of the various plaintiffs and determine which one has the most to gain from the lawsuit." 306 F.3d  
 26 at 230 (footnote omitted). Here, CLAL and Direct have the most to gain from the lawsuit because  
 27 they have the "largest financial stake in the controversy." *Id.* That is, they have "the largest

1 financial interest in the relief sought by the class.” 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb).  
 2 The “largest financial interest” is not defined under the PSLRA, but most courts understand that term  
 3 to mean the largest amount of losses in a securities litigation.

4       Although after the passage of the PSLRA many courts relied upon the First-In-First-Out  
 5 (“FIFO”) methodology for calculating losses to determine lead plaintiffs, most courts today hold that  
 6 Last-In-First-Out (“LIFO”) is the preferred method over FIFO. As Judge Scheindlin of the Southern  
 7 District of New York recently noted, courts have ““generally rejected FIFO as an appropriate means  
 8 of calculating losses in securities fraud cases.”” *Hunt v. Enzo Biochem, Inc.*, 2008 U.S. Dist. LEXIS  
 9 1472, at \*21 (Jan. 8, 2008) (quoting *In re eSpeed, Inc. Sec. Litig.*, 232 F.R.D. 95, 101 (S.D.N.Y.  
 10 2005). *See also In re Comverse Technology, Inc., Sec. Litig.*, 2007 U.S. Dist. LEXIS 14878, at \*22-  
 11 \*25 (E.D.N.Y. Mar. 2, 2007); *Hill v. The Tribune Company*, 2005 U.S. Dist. LEXIS 2391, at \*10  
 12 (N.D. Ill. Oct. 13, 2005) (“The current majority view, however, is apparently that securities fraud  
 13 losses should be calculated using LIFO.”)  
 14

15       Based on the filings made in support of the movants’ motions for appointment of lead  
 16 plaintiff, CLAL and Direct had an damages expert calculate the losses of each movant for the period  
 17 of March 1, 2007 through December 3 2007. *See generally* Nettesheim Dec., at ¶12 and Exhibit 2A.  
 18 The following chart shows the net shares purchased and retained through December 3, 2007 and  
 19 trading losses under the LIFO methodology based on CLAL and Direct’s expert’s calculations:  
 20  
 21  
 22  
 23  
 24  
 25  
 26  
 27  
 28

|    | <u>Movant</u>          | <u>Retained Shares</u> | <u>Gain/(Loss)</u>   |
|----|------------------------|------------------------|----------------------|
| 1  | CLAL                   | 88,715                 | \$(2,680,480)        |
| 2  | Direct                 | <u>24,720</u>          | <u>\$ (399,757)</u>  |
| 3  | <b>CLAL and Direct</b> | <b>113,435</b>         | <b>\$(3,080,237)</b> |
| 4  | NEIP                   | 89,336                 | \$(2,369,981)        |
| 5  | Harel                  | 421                    | \$ (4,316)           |
| 6  | Harel PIA              | 1,845                  | \$ 259,218           |
| 7  | Phoenix                | 2,000                  | \$ 309,293           |
| 8  | Primsa Mutual Funds    | 32,104                 | \$ (658,027)         |
| 9  | Prisma Provident Funds | <u>31,735</u>          | <u>\$ (443,615)</u>  |
| 10 | <b>Israeli Group:</b>  | <b>68,105</b>          | <b>\$(1,105,958)</b> |
| 11 | Steelworkers           | 28,200                 | \$ (606,977)         |
| 12 | Detroit Police & Fire  | 27,823                 | \$ (442,804)         |
| 13 | Westend                | 13,800                 | \$ (225,024)         |
| 14 | IBEW                   | 2,767                  | \$ (70,221)          |
| 15 | APERS                  | 2,900                  | \$ (47,691)          |
| 16 | Baldwins               | 0                      | 0                    |

19 Since the Supreme Court's decision in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336  
 20 (2005), some courts have focused more on retained shares as well as losses as an indication of the  
 21 "largest financial interest" in the litigation. See, e.g., *In re Comverse Technology, Inc. Sec. Litig.*,  
 22 2007 U.S. Dist. LEXIS 14878, at \*22-\*25 (E.D.N.Y. Mar. 2, 2007). This approach utilizes the  
 23 factors first described in *In re Olsten Corp. Sec. Litig.*, 3 F. Supp.2d 286, 296 (E.D.N.Y. 1998); *Lax*  
 24 v. *First Merchants Acceptance Corp.*, 1997 U.S. Dist. LEXIS 11866, 1997 WL 461036, at \*5 (N.D.  
 25 Ill. Aug. 11, 1997), with a particular emphasis on the retained shares and LIFO losses. Here, CLAL  
 26 and Direct's have the largest losses under the LIFO methodology and the greatest financial interest  
 27

1 based on retained shares. Accordingly, CLAL and Direct are presumed to be the most adequate  
 2 plaintiff.

3       c.     Typicality and Adequacy

4       Having ascertained which movant has the largest financial interest in the outcome of this  
 5 litigation, “the court must appoint that plaintiff as lead, unless it finds that he does not satisfy the  
 6 typicality or adequacy requirement.” *Cavanaugh*, 206 F.3d at 732. For purposes of a motion to  
 7 appoint lead plaintiff pursuant to the PSLRA, however, all that is required is a “preliminary showing”  
 8 that the lead plaintiff’s claims are typical and adequate. *Aronson v. McKesson HBOC, Inc.*, 79 F.  
 9 Supp. 2d 1146, 1158 (N.D. Cal. 1999)(citing *Wenderhold v. Cylink Corp.*, 188 F.R.D.577, 587 (N.D.  
 10 Cal. 1999)). *See also Tanne v. Autobytel, Inc.*, 226 F.R.D. 659, 666 (C.D. Cal. 2005).

11       The typicality requirement of Fed. R. Civ. P. 23(a)(3) is satisfied where the named  
 12 representative’s claims have the “same essential characteristics as the claims of the class at large.”  
 13 *Danis v. USN Communs., Inc.*, 189 F.R.D. 391, 395 (N.D. Ill. 1999). “A class is typical if it arises  
 14 from the same event or course of conduct that gives rise to claims of other class members and all  
 15 claims are based on the same legal theory.” *Id.* Indeed, the “similarity of legal theory may control  
 16 even where factual distinctions exist between the claims of the named representatives and the other  
 17 class members.” *Id.* *See Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (The  
 18 typicality requirement serves to “assure that the interest of the named representative aligns with the  
 19 interests of the class.”) (citation omitted).

21       Here, CLAL’s and Direct’s claims are typical of those of the Class. Each alleges, as do all  
 22 class members, that defendants violated the Exchange Act by making what they knew or should have  
 23 known were false or misleading statements of material facts concerning Verifone, or omitted to state  
 24 material facts necessary to make the statements they did make not misleading. CLAL and Direct, as  
 25 did all members of the Class, purchased Verifone common stock during the Class Period at prices  
 26 artificially inflated by defendants’ misrepresentations or omissions and were damaged upon the  
 27 disclosure of those misrepresentations and/or omissions. These shared claims, which are based on  
 28

1 the same legal theory and arise from the same events and course of conduct as the class claims,  
 2 satisfy the typicality requirement of Rule 23(a)(3).

3       The adequacy of representation requirement of Rule 23(a)(4) is satisfied where it is  
 4 established that a representative party “will fairly and adequately protect the interests of the class.”  
 5 Accordingly,

6           The Ninth Circuit has held that representation is “adequate” when  
 7 counsel for the class is qualified and competent, the representative’s  
 8 interests are not antagonistic to the interests of absent class members,  
 and it is unlikely that the action is collusive.

9 *Takeda v. Turbodyne Techs, Inc.*, 67 F. Supp. 2d 1129, 1137 (C.D. Cal. 1999)(citing *In re Northern*  
 10 *Dist. Of Cal., Dalkon Shield IUD Prod. Liab. Litig.*, 693 F.2d 847, 855 (9th Cir. 1982)). Accord  
 11 *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978). The class representative  
 12 must also have “sufficient interest in the outcome of the case to ensure vigorous advocacy.” *Takeda*,  
 13 67 F. Supp. 2d at 1137 (citing *Riordan v. Smith Barney*, 113 F.R.D. 60, 64 (N.D. Ill. 1986)).

14       CLAL and Direct are adequate representatives for the Class. There is no antagonism between  
 15 their interests and those of the Class and their losses demonstrate that they have sufficient interests  
 16 in the outcome of this litigation. On the other hand, two of the members of the Israeli Institutional  
 17 Investor Group do not have any losses during the Class Period, and therefore lack the standing to  
 18 bring this action. Thus, they are neither typical nor adequate to represent the Class.  
 19

20       Furthermore, CLAL and Direct are exactly the type of investor that Congress intended to lead  
 21 securities class actions in passing the PSLRA. See H.R. Conf. Rpt. No. 104-369, 104th Cong. 1st  
 22 Sess (Nov. 28, 1995). Moreover, CLAL and Direct have a history of collaborating together in Israel.  
 23 Many of the employees of Direct began their careers at CLAL, which is the preeminent investment  
 24 house in Israel. More importantly, Giora Zarechansky, the CEO of Direct, a signatory to Direct’s  
 25 Certification, and the liaison for Direct who will be overseeing the litigation, worked for a number  
 26 of years as a senior executive at CLAL and is well acquainted with the senior management of CLAL  
 27 who will be overseeing this litigation. Indeed, Mr. Zarechansky has known Yossi Alharal, the  
 28

1 signatory for the CLAL Certification and liaison with CLAL in this litigation, for years prior to this  
 2 litigation, which will further facilitate the oversight of Class Counsel and the litigation by both CLAL  
 3 and Direct.

4 Such pre-existing relationships and the fact that it is only two entities in the group are  
 5 predicates endorsed by courts and the SEC as justifying the appointment of a group. For example,  
 6 in *Aronson*, 79 F. Supp. 2d at 1153, the district court held that absent a pre-existing relationship such  
 7 as that between CLAL and Direct would thwart Congress's intention to prevent lawyer-driven  
 8 litigation. *Accord In re Razorfish, Inc. Sec. Litig.*, 143 F. Supp. 2d 304, 308-09 (S.D.N.Y. 2001).  
 9 The SEC, as well as district courts, have held that unrelated persons or entities may comprise a group  
 10 so long as the group is small. *See Weltz v. Lee*, 1999 F.R.D. 129, 132-33 (S.D.N.Y. 2001); *In re Baan*  
 11 *Co., Sec. Litig.*, 186 F.R.D. 214, 216-17 (D.D.C. 1999) (citing SEC amicus brief in support thereof).  
 12 Here, CLAL and Direct have the pre-existing relationships required by *Aronson* and *Razorfish*, and  
 13 are of the size endorsed by *Baan* and the SEC. Accordingly, CLAL and Direct satisfy the grounds  
 14 for appointment as a "group" whose claims are typical and will adequately represent the Class.  
 15

16       **d. Rebutting the Presumption**

17       The "third step of the process is to give other plaintiffs an opportunity to rebut the  
 18 presumptive lead plaintiff's showing that it satisfies Rule 23's typicality and adequacy requirements."  
 19 *Cavanaugh*, 306 F.3d at 730. Generally, investment managers like CLAL and Direct are challenged  
 20 on typicality grounds and adequacy grounds because they trade on accounts other than their own.  
 21 Here, however, CLAL's accounts include its own shares, mutual fund shares, and pension fund shares.  
 22 Direct's accounts include its own shares and pension fund shares.

23       Under Israeli law, CLAL and Direct have power of attorney over the shares invested for mutual  
 24 funds pursuant to Article 76B of the Mutual Joint Investments Law. Further, under Article 3 of the  
 25 Financial Services Supervisor Act, CLAL and Direct are authorized to take all actions available to  
 26 recover pension funds' assets.

27       Further, CLAL's investment contracts give CLAL the right to handle on behalf of its client  
 28

1 the technical aspects relating to litigation in or outside Israel which are necessary for establishing the  
 2 client's right to receive any form of compensation.

3 Accordingly, although CLAL's and Direct's accounts included shares for mutual funds and  
 4 pension funds, as well as their own shares, Israeli law and the investment contracts authorize them  
 5 to lead this action on their clients' behalf and the Class.

6 The fact that CLAL and Direct purchased shares on the Tel Aviv Stock Exchange, the TASE,  
 7 is also of no moment. As Judge Chin noted recently under similar circumstances,

8 Other courts in this District have appointed foreign investors as class  
 9 representatives in securities class actions that included both foreign  
 10 and U.S. purchasers of a foreign company's shares. See, e.g., *In re*  
*Nortel Networks Corp. Sec. Litig.*, No. 01 Civ. 1855 (RMB), 2003  
 11 U.S. Dist. LEXIS 15702, 2003 WL 22077464 (S.D.N.Y. Sept. 8,  
 12 2003) (certifying class action brought by Canadian union pension trust  
 13 fund alleging fraud in connection with securities of Canadian  
 14 Company). While defendants may raise a subject matter jurisdiction  
 15 defense, such a defense would not be "unique" to [proposed class  
 representative], as it appears that many (if not most) of the class  
 members would be foreign investors. [The proposed class  
 representative] elected to file suit here, and there is no reason to doubt  
 its ability to respond to a motion to dismiss for lack of subject matter  
 jurisdiction, should such a motion be made.

16 *Corwin v. Seizinger*, 2008 U.S. Dist. LEXIS 3045, at \*13-\*14 (S.D.N.Y. Jan. 8, 2008).

17 Here, more than half of all of the outstanding share of Verifone trade on the TASE, which  
 18 likely means that "many (if not most) of the class member would be foreign investors." Moreover,  
 19 lead investors, like CLAL and Direct, "can defend the lack of subject matter jurisdiction argument  
 20 by providing evidence that much of [Defendants'] fraudulent scheme occurred in the United States."  
 21 *In re Cable & Wireless, PLC, Secs. Litig.*, 217 F.R.D. 372, 377 (E.D. Va. 2003), citing *Cromer Fin.  
 22 Ltd. v. Berger*, 137 F. Supp. 2d 452 (S.D.N.Y. 2001); *Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir.  
 23 1991); accord *Corwin*, 2008 U.S. Dist. LEXIS 3045, at \*14-\*15.

25 Moreover, because, here, the *Eichenholtz* Complaint alleges misrepresentations in Verifone's  
 26 Form 10-Q's filed with the Securities and Exchange Commission, subject matter jurisdiction is  
 27 supported for shares purchased on foreign exchanges. See *Itoba, Ltd. v. Lep Group PLC*, 54 F.3d  
 28

1 118, 123 (2d Cir. 1995); *In re Royal Ahold N.V. Secs. & ERISA Litig.*, 351 F. Supp.334, 362 (D. Md.  
 2 2004). Further, assuming *arguendo* that an Israeli court did not give *res judicata* effect to judgments  
 3 or settlements in a U.S. class action, “the risk of nonrecognition does not compel exclusion of all  
 4 foreign class members.” *In re Vivendi Universal, S.A. Secs. Litig.*, 242 F.R.D. 76, 104 (S.D.N.Y.  
 5 2007). Where, as here, “significant alleged conduct occurred in the United States . . . the United  
 6 States has a strong interest in the enforcement of those laws where applicable.” *Id.*

7 In sum, neither CLAL’s and Direct’s status as investment managers, nor the fact that they are  
 8 foreign investors, raises any typicality or adequacy grounds to rebut the presumption that they are  
 9 the most adequate plaintiffs in this litigation. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I).

10 **B. CLAL’S AND DIRECT’S SELECTION OF COUNSEL SHOULD BE  
 11 APPROVED AS LEAD AND LIAISON COUNSEL FOR THE CLASS**

12 The PSLRA vests authority in the lead plaintiff to select lead counsel, subject to approval by  
 13 the Court. 15 U.S.C. § 78u-4(a)(3)(B)(v); *Osher*, 2001 U.S. Dist. LEXIS 6057, at \*15. The Court  
 14 should only interfere with lead plaintiff’s selection when necessary “to protect the interests of the  
 15 class.” *See* H.R. Conf. Rpt. No. 104-369, at 35, 104th Cong. 1st Sess (Nov. 28, 1995); 15 U.S.C. §  
 16 78u-4(a)(3)(B)(iii)(II)(aa). Indeed, the “Court’s role is limited to approving (or rejecting) that  
 17 choice.” *Erikson v. Cornerstone Propane Partners LP*, 2003 U.S. Dist. LEXIS 18009, at \*12, *citing*  
 18 *Cavanaugh*, 306 F.3d at 734.

19 Here, CLAL and Direct have selected Pomerantz Haudek Block Grossman & Gross LLP to  
 20 serve as Lead Counsel and Cotchett, Pitre & McCarthy to serve as Liaison Counsel for the Class.  
 21 As detailed in its firm resumes (*see* Dahlstrom Dec., Exhibit D), the Pomerantz firm has extensive  
 22 expertise and experience in the field of securities litigation and has successfully prosecuted numerous  
 23 securities fraud class actions and obtained excellent recoveries on behalf of defrauded investors.  
 24 Thus, the Court may be confident that the Class will receive the highest caliber of legal  
 25 representation.

## **CONCLUSION**

CLAL and Direct respectfully requests that the Court appoint them as Lead Plaintiff, approve their selection of Pomerantz Haudek Block Grossman & Gross LLP to serve as Lead Counsel and Cotchett, Pitre & McCarthy to serve as Liaison Counsel for the Class, and grant such other relief as the Court may deem to be just and proper.

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Respectfully submitted,

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